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**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



*H6*

FILE: [Redacted] Office: PHILADELPHIA, PA  
(consolidated therein)

Date: APR 13 2010

IN RE: Applicant: [Redacted]

APPLICATION: Application for Waivers of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h)

ON BEHALF OF APPLICANT:  
[Redacted]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of Cambodia and citizen of Canada who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant was also determined to have committed a crime involving moral turpitude and, therefore, to be inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). The record indicates that the applicant is married to a naturalized United States citizen. He is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his United States citizen wife.

The District Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's spouse and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated May 5, 2006.

On appeal, the applicant, through counsel, asserts that U.S. Citizenship and Immigration Services (USCIS) "erred in its decision." *Form I-290B*, filed June 7, 2006. Additionally, counsel claims that the applicant's wife "has presented significant proof that the hardship she will face is extreme. She has shown that she has a significant health condition, that her financial situation will be greatly impacted, that she has no family ties in Canada and would have difficulty assimilating due to her limited English ability." *Id.*

The record includes, but is not limited to, counsel's appeal brief; an affidavit from [REDACTED] who states she is the applicant's stepdaughter; a letter from [REDACTED] medical records concerning the applicant's wife injury in 1993; and a psychological evaluation of the applicant's wife. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

- (i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

....

- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

- (v) Waiver.-The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present case, the record indicates that the applicant entered the United States in 2000, voluntarily departing in 2002. On December 13, 2002, the applicant attempted to reenter the United States. He was denied entry based on his previous unlawful residence and employment in the United States. On December 16, 2002, the applicant married [REDACTED] a lawful permanent resident of the United States, in Canada. On December 19, 2002, the applicant attempted to reenter the United States but was denied entry. On July 3, 2003, the applicant reentered the United States and has remained. On December 15, 2004, the applicant's wife became a United States citizen. On June 20, 2005, the applicant's wife filed a Form I-130 on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On January 10, 2006, the applicant's Form I-130 was approved. On April 10, 2006, the applicant filed a Form I-601. On May 5, 2006, the District Director denied the applicant's Form I-485 and Form I-601, finding that the applicant had accrued more than a year of unlawful presence, that he was inadmissible for having committed a crime involving moral turpitude, and had failed to demonstrate extreme hardship to his United States citizen spouse.

Although the District Director determined that the applicant had accrued more than one year of unlawful presence in the United States, the AAO notes that Canadian nonimmigrant visitors are generally not issued Form I-94s, Arrival/Departure Records, and are, therefore, treated as having been admitted for duration of status. As such, they accrue unlawful presence only after a status violation has been determined by the Department of Homeland Security (DHS) or an immigration judge. The record does not reflect that the applicant was issued a Form I-94 at the time of either of his nonimmigrant admissions. Neither is there evidence that he was previously determined to have violated his nonimmigrant status. Accordingly, the AAO does not find the applicant to be inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having accrued more than one year of unlawful presence.

However, the applicant is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for having entered the United States through fraud or the willful misrepresentation of a material fact.<sup>1</sup> Although the applicant entered the United States as a nonimmigrant on July 3, 2003, the AAO notes that

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<sup>1</sup> The AAO conducts the final administrative review and enters the ultimate decision for United States Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case *de novo* as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in *de novo* review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director did not identify all of the grounds for denial in the initial decision.

the record indicates that he immediately violated his nonimmigrant status by resuming his prior employment and that he has lived in the United States since his 2003 admission. *Form G-325A, Biographic Information, for the applicant.* Based on the record before it, the AAO finds that in seeking admission to the United States as a nonimmigrant, the applicant misrepresented his intention to work and reside in the United States. Accordingly, he is inadmissible to the United States under section 212(a)(6)(C)(i) of the Act and must seek a waiver of this inadmissibility under section 212(i) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) In general.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
- (iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

- (i) (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien...

The applicant may also be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having committed a crime involving moral turpitude, as he indicates on his Form I-485 adjustment application that, in 1987, he was convicted of assault in Canada and served one year of probation. However, there is no documentation of an assault conviction in the record and a letter from the FOI Supervisor for the Ottawa Police Service states that the applicant's criminal record has been purged. Although the AAO is unable to determine whether the applicant's conviction for assault would bar his admission to the United States, it notes that, even if the applicant were to be found inadmissible based on his conviction, eligibility for a waiver under section 212(i) of the Act would also establish his eligibility for a waiver under section 212(h) of the Act.

A section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C)(i) of the Act is dependent first upon a showing that the bar would impose extreme hardship on the citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant himself experiences upon removal is not directly relevant to a determination of extreme hardship in section 212(i) waiver proceedings. The AAO also notes that the record contains references to the hardship that the applicant's stepdaughter would suffer if the applicant were to be denied admission into the United States. However, a waiver

under section 212(i) is available solely where the applicant establishes extreme hardship to his or her citizen or lawfully resident spouse or parent. Unlike a waiver under section 212(h) of the Act, Congress does not mention extreme hardship to United States citizen or lawful permanent resident children. Therefore, hardship to the applicant's stepdaughter will not be considered in this proceeding except to the extent that it creates hardship for her mother, the only qualifying relative. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not...fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Cervantes-Gonzalez*, the Board of Immigration Appeals (BIA) set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has also held:

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

*Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

U. S. courts have stated, "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted). Separation of family will therefore be given appropriate weight in the assessment of hardship factors in the present case.

The AAO notes, however, that the courts have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). The common results of deportation are insufficient to prove extreme hardship as extreme hardship has generally been defined as hardship that is unusual or beyond that which would normally be expected upon deportation. *See Perez v. INS*, 96 F.3d 390 (9th Cir. 1996); *see also Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and

community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). Only “in cases of great actual or prospective injury...will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

Extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or remains in the United States, as there is no requirement that the qualifying relative reside outside the United States based on the denial of the applicant’s waiver request.

In his appeal brief, filed June 7, 2006, counsel states that the applicant’s wife “has suffered severe, permanent injury to her brain which impairs her ability to function on a daily basis” and “require[s] constant care.” Counsel asserts that the applicant’s wife would have difficulty assimilating to Canada, because of her limited English proficiency and that “[h]er cognitive deficiencies and memory problems will make it difficult if not impossible for her current low level of English ability to improve.” He also states that the applicant’s wife has no family ties to Canada and that her family members reside in the United States. Counsel further states that, in light of the applicant’s wife’s inability to support herself and her need for social assistance, there is no guarantee that she would be able to obtain landed immigrant status in Canada. In an affidavit dated June 6, 2006, [REDACTED] who indicates that she is the applicant’s stepdaughter, states that her mother is still traumatized from a beating that took place in 1993 and is still unable to remember things. The record establishes that, on April 20, 1993, the applicant’s wife was attacked by her ex-boyfriend and beaten in the head with a hammer and then slammed head-first into a television screen. In a psychological evaluation dated February 6, 2006, [REDACTED] diagnoses the applicant’s wife with severe cognitive disorder. [REDACTED] states that the applicant’s wife’s long-term memory is deteriorating; and her verbal memory, visual-motor functioning, and visual memory are impaired.

While the AAO acknowledges that the record establishes the impairment of the applicant’s wife’s memory, it does not find this documentation to establish that she would experience extreme hardship if she were to relocate to Canada with the applicant. Counsel’s contention that the applicant’s wife would have difficulty assimilating to Canada because of her limited proficiency in the English language is unpersuasive in that applicant’s wife has resided since 1983 in the United States, an English-speaking country. Moreover, although the AAO notes counsel’s observations about the requirements of Canada’s immigration system, it does not find the record to establish that the applicant would be unable to obtain employment with sufficient income to meet whatever financial requirements might be imposed on his wife’s residency. The AAO also notes that the record includes no documentary evidence that demonstrates that relocating to Canada would have a negative mental/emotional impact on the applicant’s wife. Accordingly, the AAO does not find the applicant to have demonstrated that his wife would suffer extreme hardship if she were to move with him to Canada. He has, however, established extreme hardship to his wife if she remains in the United States without him.

Counsel states that the applicant’s “departure from the United States would have a devastating financial impact on [the applicant’s wife]” as she is “fully supported by [the applicant] and [her] daughter.” Counsel indicates that the applicant’s wife’s daughter resides with the applicant and his wife, that she

financially supported her mother prior to her mother's marriage to the applicant and that she has recently lost her job. Counsel states that the applicant's wife "is unable to support herself financially" and that when she attempts to be gainfully employed she loses her jobs "because of her memory loss and other impairments." Counsel states that the applicant is his wife's primary caregiver and that she is fully dependent on him. In his evaluation of the applicant's wife, [REDACTED] states that because of the applicant's wife's deteriorating memory, she cannot work. [REDACTED] further states that the applicant's wife is "unable to function independently and requires the help of [the applicant] to manage on a day-to-day basis."

The AAO acknowledges that the applicant's wife suffered head trauma in 1993, which has resulted in serious, long-term impairments, especially to her memory, and that these impairments hinder her ability to support herself or to function independently. It finds that when the applicant's wife's impairments and her dependence on the applicant are considered in combination with the normal hardships that result from the removal of a loved one, the applicant has established that his wife would experience extreme hardship if his waiver request were to be denied and she remained in the United States.

However, in that the record does not also establish that the applicant's wife would suffer extreme hardship if she relocated to Canada, the applicant has failed to establish extreme hardship to his wife under section 212(i) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.